STATE OF MICHIGAN

IN THE SUPREME COURT

IN RE: ESTATE OF HERMANN VON-GREIFF

Supreme Court Case No: 161535
Court of Appeals No: 347254
Marquette Probate Court No: 18-34046-DE

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APPELLEE ANNE JONES-VON GREIFF'S BRIEF IN OPPOSITION TO

APPELLANT CARLA VON GREIFF'S APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF FACTS

Appellant's Statement of Facts is misleading. While Appellee Anne Jones-Von Greiff did testify that she intended never to live together with Hermann Von Greiff as a married couple after May 18, 2017, she so testified in the context of having filed for a divorce from Hermann less than two weeks later on June 1, 2017. Hermann had ordered her from the marital home (titled only in his name), telling her that he never wanted to see her face again, and had transferred the vast majority of the financial resources out of their joint accounts. Details of their relationship up to that point are described at considerable length in her Brief on Appeal to the Court of Appeals, but suffice it to say that the events of the previous two weeks left her with the belief that unless she protected herself by filing a divorce action against Hermann, she would be left without access to the marital home and without the couple's jointly held financial resources.

Anne filed the divorce Complaint upon discovering these actions by Hermann, and sought and obtained an *ex parte* order (Trial Exhibit #9) from the Circuit Court, granting her exclusive occupancy of the marital home and ordering that the bank accounts that had been transferred out of Anne's reach be restored to their original ownership. Once the divorce action had been served on Hermann and he had obtained counsel, on July 17, 2017, the parties entered into a Stipulated Order Modifying Ex Parte Order (Trial Exhibit #7) regarding the marital home and the financial accounts. The Stipulated Order Modifying Ex Parte Order provided that Anne was to have possession of the marital home. By July 17, 2017, when the Stipulated Order Modifying Ex Parte Order was prepared by Hermann's counsel and entered by the Circuit Court, it was already clear that Hermann would not be able to return to the marital home for health reasons, and the plan was that Hermann relocate to Florida (where his offspring live) and be a resident in an assisted living facility there.

The divorce action continued in Marquette County Circuit Court, with significant delays. A final divorce hearing in Circuit Court was held April 18, 2018, where the parties put the detailed property

settlement agreement on the record, and left the sole issue of spousal support for the court to decide. The Circuit Court rendered a written opinion on the issue of spousal support on May 29, 2018, but before the final judgment of divorce could be prepared and entered, Hermann Von Greiff died on June 17, 2018.

During the thirteen months after she first left the marital home at the behest of Hermann, Anne did not have direct contact with Hermann; her testimony was that she never wanted to live together with him again, and she filed the divorce action against him to end their marriage legally. Obviously, during the pendency of the divorce, the parties interacted with each other though their respective counsel. Hermann's testimony during the divorce final hearing was by video from the assisted living facility where he had been a resident since July 11, 2017. He made it clear that he did not anticipate ever being able to live independently again.

Anne Jones-Von Greiff was absent from the marital home for less than two weeks in May of 2017. Upon filing the divorce and obtaining the Ex Parte Order on June 2, 2017, she moved back into the marital home in Marquette. She never resided anywhere else during the pendency of the divorce action. The party physically absent from the marital home after May 18, 2017, was Hermann Von Greiff, and after the entry of the Stipulated Order Modifying Ex Parte Order on July 17, 2017, the separate living arrangements of the parties were by agreement.

Anne did not actually learn of Hermann's death for more than a week after it occurred, when her counsel was informed by Hermann's counsel that Hermann had died and the divorce action was to be dismissed. When Anne presented an Application for Probate of Hermann's estate as an intestate estate and requested appointment as Personal Representative, she discovered that Appellee had already filed for Probate and appointment as PR, petitioning the Probate Court for a determination that Anne was not a surviving spouse because she had willfully been absent from Hermann for over one year prior to his death and had abandoned him. Anne's Petition for Probate and Appointment of Personal Representative

was therefore filed as a Counter-Petition on July 20, 2018, along with her Objection to Petition to Deny Anne Jones-Von Greiff the Privileges of a Surviving Spouse. The Probate Court decided to hold an evidentiary hearing on the competing Petitions before appointing a Personal Representative.

After hours of testimony during a multi-day hearing taking place over several months and after extensive briefing, on December 26, 2018, the Probate Court issued a written ORDER FINDING ANNE JONES-VON GREIFF NOT THE SURVIVING SPOUSE OF HERMANN VON GREIFF PURSUANT TO MCL 700.2801, deciding that Anne had absented herself completely, both emotionally and physically from Hermann for more than one year before his death. That December 26, 2018 ORDER was appealed as of right by Anne Jones-Von Greiff.

The 2-1 Majority Opinion of the Court of Appeals panel held that the time period of one year set forth in MCL 700.2801(2)(e)(i) did not run during the pendency of a divorce action between the parties as a matter of law, and that the evidentiary hearings held in the Probate Court were unnecessary and irrelevant. The Opinion of the Majority reversed the Probate Court's ORDER FINDING ANNE JONES-VON GREIFF NOT THE SURVIVING SPOUSE OF HERMANN VON GREIFF PURSUANT TO MCL 700.2801, and declared Anne Jones-Von Greiff to be the surviving Spouse of Hermann Von Greiff, Deceased, and entitled to the benefits of that legal status.

It is certainly true that Judge Kelly authored a dissenting opinion. What Appellant's Application for Leave to Appeal fails to mention is the statement at the conclusion of that dissent, "If the Legislature so desires, it can expressly state that a divorcing spouse is not disinherited by statute if his or her spouse dies before a final judgment of divorce is entered. I encourage our legislators to do so." This statement makes Judge Kelly's position clear, "Right result, wrong reason." The following Argument section of this Brief in Opposition to Carla Von Greiff's Application for Leave to Appeal will address this issue.

ARGUMENT

1. **THE ISSUES PRESENTED BY THIS DISPUTE ARE NOT IMPORTANT TO THE JURISPRUDENCE OF MICHIGAN, AND DO NOT JUSTIFY THIS COURT GRANTING LEAVE TO APPEAL.**
2. **THE COURT OF APPEALS' MAJORITY CORRECTLY APPLIED THE SUPREME COURT'S DECISION IN *IN RE ERWIN ESTATE* BY REVERSING THE PROBATE COURT.**
3. **THE COURT OF APPEALS' MAJORITY DID NOT "REWRITE" MCL 700.2801(2)(e)(i).**

1. THE ISSUES PRESENTED BY THIS DISPUTE ARE NOT IMPORTANT TO THE JURISPRUDENCE OF MICHIGAN, AND DO NOT JUSTIFY THIS COURT GRANTING LEAVE TO APPEAL.

MCL 700.2801(2)(e)(i) has been part of the Michigan Statutes since the adoption of EPIC in 1998. EPIC repealed a similar, but not identical, provision in the Revised Probate Code at MCL 700.290. The Revised Probate Code was Act 642 of PA 1978. In the forty-plus years this forfeiture provision has been part of Michigan law, five (5) cases involving its appropriate interpretation have been the subject of reported appellate decisions. **Tkachik v Mandeville**, 282 Mich App 364; 764 NW2d 318 (2009), **Forbes-Lager v Lager**, 286 Mich App 158; 779 NW2d 310 (2009), **Lovett v Peterson**, 315 Mich App 423; 889 NW2d 753 (2016), **King v Nash (In Re Erwin Estate)**, 501 Mich 872; 901 NW2d 857 (2017), and now this instant matter.

In each of those decisions (prior to the instant matter), the facts recited by the appellate court make it clear that the parties to the controversy were not involved in a pending divorce at the death of the decedent spouse. In other words, in each of these prior cases, the parties had been allegedly

separated or willfully absent from one another for more than one year without either of them attempting to end their marriage legally. In terms of importance to the jurisprudence of this state, one case arising in over forty years hardly qualifies as so important as to cause this Court to spend its time pondering it. And as will be shown in the remaining arguments, the probable result of this Court's review will not change the outcome mandated by the Court of Appeals' majority opinion. In truth, this dispute only arises because of the failure of the court system to resolve or process a divorce action without minor children to judgment within a one-year time period.

Appellant's argument that the Court of Appeals decision will frustrate estate plans of "abandoned spouses" is simply ridiculous and not a factor in this case. An "abandoned spouse" can protect against the other party to the marriage having a claim against his or her estate by exercising the right to end the marriage "legally", a right now available in Michigan on demand of either party. Here, there was not an "estate plan" to be frustrated; Hermann Von Greiff died intestate, even though he was perfectly capable of executing a will at any time before his death.

The argument that an "abandoning" spouse would receive a "windfall" by receiving ownership of jointly owned assets which would have been divided in a completed divorce action also fails logical analysis. The reason Michigan requires that a marriage only be dissolved by court action is to protect the spouses' property interests by having an unbiased, independent division of those assets by a judge in a divorce action. Anne Jones-Von Greiff sought to have a court determine how the marital assets she and Hermann had accumulated during their marriage should be divided.

2. THE COURT OF APPEALS MAJORITY CORRECTLY APPLIED THE SUPREME COURT'S DECISION IN *IN RE ERWIN ESTATE* BY REVERSING THE PROBATE COURT.

In Re Erwin Estate, supra, mandates that a court determining whether a person is a "surviving spouse" under MCL 700.2801(2)(e) evaluate "whether complete physical and emotional absence existed, resulting in an end to the marriage for practical purposes." ***In Re Erwin Estate***, supra, p. 24. That is exactly what the Court of Appeals majority did, and what the Probate Court did not. In describing the inquiry necessary, the Erwin court said:

> "As a result, when MCL 700.2801(2)(e)(*i*) is read in this proper context, the following explication becomes clear: willful absence requires consideration of the totality of the circumstances. It presents a factual question for the trial court to answer: whether a spouse's complete absence brought about a practical end to the marriage.[9]"
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> ***In Re Erwin Estate***, supra, pp. 13-14.

The totality of the circumstances here include the pending divorce action, initiated by Anne to end her marriage to Hermann, not in a practical sense, but <u>legally</u>, which she had every right to do. The Probate Court's decision that she forfeited her status as a "surviving spouse" for exercising that right is simply not acceptable, and flies directly in the face of the language used in Erwin when the majority analyzed the relationship between sub-paragraphs (i), (ii) and (iii) of MCL 700.2801(2)(e):

> "…, MCL 700.2801(2)(e)(*ii*) and (*iii*) involve intentional acts that bring about a situation of divorce in practice, even when the legal marriage has not been formally dissolved. MCL 700.2801(2)(e)(*i*) should be interpreted with this context in mind."
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> ***In Re Erwin Estate***, supra, p12

Even though the Probate Court declared otherwise in its ORDER FINDING ANNE JONES-VONGREIFF NOT THE SURVIVING SPOUSE OF HERMANN VONGREIFF.

> "This Court is not looking to Anne Jones-VonGreiff to make a continuous effort to maintain the marital relationship." **ORDER**, supra, p. 8,

it is entirely clear that Anne's decision that she was not going to be married to Hermann any longer, and her initiation of the divorce action, was a important factor in the Probate Court's decision to remove her from "surviving spouse" status.

> At no time after filing the divorce did Anne Jones-Von Greiff ever express a desire to live with Hermann. Mrs Von Greiff further agreed that after the filing of the divorce, she never had any intention to return to the marriage. **ORDER**, supra, p. 5

In other words, once Anne began the process of ending her marital relationship legally, the Probate Court was still requiring her to maintain emotional support and contact. The ***Erwin*** court has said that MCL 700.2801(2)(e) does not so require:

> However, we agree with the Court of Appeals' conclusion in Peterson that the absence described in MCL 700.2801(2)(e)(i) must be continuous for at least a year leading up to the spouse's death. Peterson, 315 Mich App at 432-433. We also agree that the statute does not require the surviving spouse to make a continuous effort to maintain the marital relationship. Id. at 434. That is, the inquiry is into whether the surviving spouse did the "absenting," not whether the surviving spouse did enough to prevent the absence.
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> ***In Re Erwin Estate***, supra, p. 20, footnote [15]

3. THE COURT OF APPEALS DID NOT "RE-WRITE" MCL 700.2801(2)(e)(i).

MCL 700.2801(2)(e)(i) is a statute of forfeiture. It simply cannot apply to a party because he or she is exercising the legal right to end a marriage. Rather than re-writing the statute, the Court of Appeals did exactly what the majority did in ***Erwin***. It construed sub-paragraph (2)(e)(i) in the only way it could to leave intact the general scheme reflected in sub-paragraphs (2)(e)(ii) and (iii) of the statute.

Statutes of forfeiture are designed to discourage certain behaviors deemed to be unacceptable by the legislature. The question then has to be asked, "Exactly what behavior is intended to be prohibited?" It is clear that the behavior intended to be prohibited by sub-paragraph (2)(e)(i) cannot be the filing of a divorce action by one spouse against the other. Ruling that the filing of a divorce action to bring about the legal end to a marriage brought with it the possibility of forfeiture under sub-paragraph (2)(e)(i) would contradict the entire construct of family law and no-fault divorce which has been part of Michigan law for four decades.

MCL 700.2801(2)(e)(i) requires that a spouse "Was willfully absent from the decedent spouse.", before he or she forfeits the status and privileges of a "surviving spouse". As the ***Erwin*** court stated:

> … a "willful" act is one that is taken with the intent to do something specific. *Jennings v Southwood*, 446 Mich 125, 140; 521 NW2d 230 (1994); cf. *People v Beaudin*, 417 Mich 570, 575; 339 NW2d 461 (1983) (explaining that a willful act is one committed with the specific intent to bring about the particular result the statute seeks to prohibit).[4]
>
> **Erwin**, supra, p. 7

Anne Jones-Von Greiff acted with the specific intent to bring about a particular result, the legal end to her marriage to Hermann. For that action, the Probate Court punished her by forfeiting her status as "surviving spouse". The Court of Appeals corrected that clear error. There is no reason for this Court to consider this matter further by granting Leave to Appeal.

CONCLUSION

Appellant's Application does not demonstrate justification for this Court to grant leave.

RELIEF SOUGHT

Anne Jones-Von Greiff requests the Court Deny Leave to Appeal in this matter.

Respectfully submitted

Dated: July 10, 2020 /s/_____

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